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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	MM Docket No. 92-265
Act of 1992	)	
	)	
Development of Competition and Diversity in Video	)	
Programming Distribution and Carriage	)	

PETITION FOR PARTIAL RECONSIDERATION

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.106 of the Commission's Rules, hereby petitions the Commission to reconsider in part its *Second Report and Order ("SR&O")* in this proceeding[1/] and to amend newly-adopted Section 76.1302(a) of the Rules to specifically afford any multichannel video programming distributor ("MVPD") aggrieved by a violation of Section 616 of the Communications Act of 1934 (the "1934 Act") standing to file a complaint.[2/]

With the *SR&O*, the Commission has promulgated rules implementing Section 12 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992

[1/] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage*, FCC 93-457, MM Docket No. 92-265 (rel. October 22, 1993)[hereinafter cited as "*SR&O*"].

[2/] WCA, the trade association of the wireless cable industry, filed comments and reply comments in response to the Commission's *Notice of Proposed Rulemaking ("NPRM")* in this proceeding.

Cable Act"), which added Section 616 to the 1934 Act. In response to a record establishing that horizontally-concentrated franchised cable multiple system operators ("MSOs") were extracting from independent programmers concessions designed to forestall the introduction of competition, Congress crafted Section 616 to protect programmers and emerging competitors alike. While WCA is generally supportive of the Commission's efforts to implement Section 616, WCA respectfully submits that the Commission has erred in failing to specifically provide an MVPD that is aggrieved by a violation of Section 616 with standing to file a complaint.

The underlying premise of the 1992 Cable Act is that franchised cable operators have abused their status as unregulated monopolies to the detriment of consumers, competitors and video programmers.[3/] In crafting the 1992 Cable Act, Congress chose to promote the emergence of competition as a means of checking cable's market power. As the House Committee on Energy and Commerce succinctly put it:

> The Committee believes that competition ultimately will provide the best safeguard for consumers in the video marketplace and strongly prefers competition in the development of a competitive marketplace to regulation.

[3/] *See e.g.* 1992 Cable Act, at § 2(a)(2)["most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers."]; H. Rep. No. 102-628, 102d Cong., 2d Sess., at 30 (1992) ["the competition to cable system operators from other providers of video programming that the Committee anticipated during consideration of the 1984 Act, such as wireless and private cable operators, cable overbuilders, the home satellite dish market and direct broadcast satellite operators, largely has failed to [emerge]"].

> The Committee also recognizes, however, that until true competition develops, some tough yet fair and flexible regulatory measures are needed.[4/]

The addition of Section 616 to the 1934 Act was an instrumental part of Congress' efforts to achieve a competitive marketplace. The record before Congress established beyond peradventure that certain horizontally-concentrated MSOs had systematically abused their market power to garner control over programming sources and frustrate the development of competitive technologies.[5/] Congress expressly recognized that while fair access to programming was a prerequisite for any wireless operator or other MVPD to emerge as a viable competitor, the market power over programmers derived by these MSOs from their *de facto* local monopolies was being abused to frustrate competition.[6/]

[4/] H. Rep. No. 102-628, 102d Cong., 2d Sess., at 30 (1992)]. *See also id.* at 27 ["[a] principal goal . . . is to encourage competition from alternative and new technology, including competing cable system[s], wireless cable, direct broadcast satellite, and satellite master antenna television services."]; *id* at 44 ["The Committee believes that steps must be taken to encourage the further development of robust competition in the video programming marketplace."]; S. Rep. No. 102-92, 102d Cong., 1st Sess., at 1 (1991)["[t]he purpose of this legislation is to promote competition in the multichannel video marketplace."].

[5/]WCA discussed the record before Congress extensively in its initial comments in this proceeding and, in the interest of brevity, will refrain from repeating that discussion here. *See* Comments of Wireless Cable Ass'n Int'l, MM Docket No. 92-265, at 10-19 (filed Jan. 25, 1993).

[6/] Indeed, in the *NPRM* the Commission recognized that "[i]n drafting the 1992 Cable Act, Congress was concerned that increased horizontal concentration and vertical integration in the cable industry have created an imbalance of power, both between cable operators and program vendors and between cable operators and their multichannel competitors (i.e., other cable systems, direct broadcast satellite (DBS) providers, satellite master antenna television (SMATV) systems, wireless cable operators, etc.)." *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Competition and Diversity in Video*

(continued...)

For example, the Senate Committee on Commerce, Science and Transportation specifically found that:

> In addition to using its market power to the detriment of consumers directly, a cable operator with market power may be able to use this power to the detriment of programmers. Through greater control over programmers, a cable operator may be able to use its market power to the detriment of video distribution competitors.[7/]

Section 616 was adopted by Congress to eliminate that threat.

WCA applauds the *SR&O* as a valuable first step towards the promulgation of rules and policies that will prevent the horizontally-concentrated MSOs from abusing their market power over programmers to the detriment of competition in the distribution marketplace. However, the *SR&O* is fatally flawed by the Commission's failure to specifically vest the MVPD that is victimized of a violation of Section 616 with standing to file a complaint with the Commission.

Although the *SR&O* is silent as to who has standing to file a complaint when a violation of Section 616 occurs, an argument can be made that the new rules implementing Section 616 limit standing to programmers. As promulgated by the *SR&O*, Section 76.1302(a) of the Rules provides that:

[6/](...continued)
Programming Distribution and Carriage, 8 FCC Rcd 194, 195 (1992) [hereinafter cited as *"NPRM"*].

[7/] *See* S. Rep. No. 102-92, 102d Cong., 1st Sess., at 23 (1991). *See also id.* at 24 ["the Committee continues to believe that the operator in certain instances can abuse its locally-derived market power to the detriment of programmers and competitors."]; H. Rep. No. 102-628, 102d Cong., 2d Sess., at 42-44 (1992)(emphasis added).

> Any video programming vendor aggrieved by conduct that it alleges to constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission.[8/]

WCA fears that this provision, if read literally, could be interpreted to limit standing solely to video programming vendors, preventing a complaint by the MVPD that is victimized when a franchised cable operator coerces exclusivity in order to frustrate competition in the distribution marketplace.

WCA respectfully submits that since competing MVPDs were clearly among the intended beneficiaries of Section 616, it defies logic to deny them standing to file complaints when violations of Section 616 occur. As demonstrated above, Congress was not merely concerned with the impact that coerced exclusivity has on programmers; Congress was equally concerned with the impact that coerced exclusivity has on the ability of emerging technologies to garner the programming necessary to compete.

Indeed, to deny MVPDs standing to complain under Section 616 is to effectively render Section 616 a paper tiger. Logic dictates, and history has proven, that if an MSO has sufficient market power over a programmer to coerce exclusivity, the MSO will be able to employ the same market power to coerce that programmer's silence. It is unrealistic to assume that in today's marketplace any programmer would risk alienating one of the horizontally-concentrated MSOs by complaining to the Commission when Section 616 is violated. Indeed, when Sumner M. Redstone, Chairman of Viacom International, Inc. ("Viacom"), recently testified before the Senate Subcommittee on

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[8/] 47 C.F.R. § 76.1302(a).

Antitrust, Monopolies, and Business Rights concerning the anti-competitive abuses Viacom has suffered at the hands of Tele-Communications, Inc. ("TCI"), he forthrightly admitted that Viacom had not come forward before because it feared retaliation.[9/]

Recent events illustrate that Viacom is not alone in its unwillingness to complain when TCI exerts its market power. During the recent round of negotiations with affiliates of the Fox Broadcasting Network ("Fox") over retransmission consent, wireless cable operators learned that Fox's new programming service, FX, would be available only to franchised cable systems. Based on these discussions with Fox affiliates, wireless cable operators believe that TCI had been able to coerce cable exclusivity from Fox for FX by implicitly or explicitly threatening to drop Fox's broadcast affiliates from TCI's cable systems and/or refusing to carry FX absent a grant of exclusivity.[10/] Given TCI's market power, it is understandable that Fox has chosen not to complain. If wireless cable operators precluded from carrying FX apparently are barred from themselves complaining by the narrow language of Section 76.1302(a), there will be no effective avenue for redress.

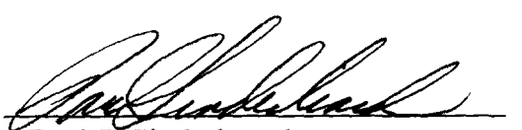
[9/] *Communications Daily*, Vol. 13, No. 208 at 2 (released October 28, 1993).

[10/] Indeed, while wireless cable operators are generally being required to pay $0.25 per subscriber per month for the right to retransmit local Fox affiliates, franchised cable systems are securing the retransmission consent and access to FX for the same $0.25 per subscriber per month. Thus, FX is not only being available to the cable industry on an exclusive basis, it is free.

WHEREFORE, for the foregoing reasons, WCA urges the Commission to amend Section 76.1302(a) to specifically afford any MVPD aggrieved by a violation of Section 616 of the 1934 Act standing to file a complaint.

Respectfully submitted,

WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

By: 
Paul J. Sinderbrand
Dawn G. Alexander

Sinderbrand & Alexander
888 16th Street, N.W.
Suite 610
Washington, DC 20006-4103
(202) 835-8292

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